

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION**

**WSOU INVESTMENTS, LLC d/b/a
BRAZOS LICENSING AND
DEVELOPMENT,**

Plaintiff,

v.

**DELL TECHNOLOGIES INC.,
DELL INC., EMC CORPORATION,
AND VMWARE, INC.,**

Defendants.

**Civil Action No.: 6:20-cv-00480-ADA-DTG
Civil Action No.: 6:20-cv-00481-ADA-DTG
Civil Action No.: 6:20-cv-00486-ADA-DTG**

JURY TRIAL DEMANDED

PUBLIC VERSION

**PLAINTIFF’S OBJECTIONS TO AND APPEAL FROM MAGISTRATE JUDGE’S
REPORT AND RECOMMENDATION GRANTING IN PART DEFENDANTS’
MOTION TO EXCLUDE PREVIOUSLY UNDISCLOSED THEORIES OF STAN
MCCLELLAN PH.D. CONCERNING INFRINGEMENT OF U.S. PATENT 9,164,800**

Plaintiff respectfully objects to and appeals Magistrate Judge Gilliland’s Report and Recommendation (“R&R”) granting in part Defendants’ Motion to Strike Previously Undisclosed Theories of Stan McClellan Ph.D. Concerning Infringement of U.S. Patent 9,164,800 (the “Motion”), as it contains erroneous findings of fact and contradicts the pertinent law and procedures.¹ *See, e.g., Baylor Health Care Sys. v. Equitable Plan Servs.*, 955 F. Supp. 2d 678, 689 (N.D. Tex. 2013); *see also* Fed. R. Civ. P. 72(a) (“The district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law.”).

¹ Pursuant to the R&R, dated January 30, 2023, (Dkt. 345), the reasoning is stated on the record of the hearing held on January 27, 2023. This transcript is not yet available. Submitted herewith is the Declaration of Jonathan K. Waldrop, dated February 10, 2023 (“Waldrop Declaration”). “Ex.” Refers to exhibits attached to the Waldrop Declaration.

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The R&R is clearly erroneous. Brazos plainly showed—supported by evidence—that

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Brazos’s infringement theories focus on [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Consequently, Brazos’s

theories were [REDACTED]

See id.; *MasterObjects, Inc. v. Meta Platforms, Inc.*, No. 21-05428-WHA, 2022 WL 4856269, at *3 (N.D. Cal. Oct. 3, 2022) (denying Meta’s motion to strike expert infringement report’s citations to IOS and Android source code not identified in the contentions because those were accused features); *Fenner Invs., Ltd. v. Hewlett-Packard Co.*, No. CIV.A. 6:08-CV-273, 2010 WL 786606, at *2 (E.D. Tex. Feb. 26, 2010) (denying motion to strike infringement report concerning layer 3 switches even though contentions did not include how the layer 3 switches retain layer 2 MAC addressing as required by the claims); *Mobile Telecomms. Techs., LLC v. Blackberry Corp.*, No. 3:12-CV-1652-M, 2016 WL 2907735, at *2 (N.D. Tex. May 17, 2016).

Moreover, Defendants’ expert, Benjamin F. Goldberg, Ph.D., responded t [REDACTED]

[REDACTED]

[REDACTED] Defendants knew of [REDACTED]

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████████████████████ See *MasterObjects*, 2022 WL 4856269, at *3 (noting that striking “will not result in a just trial” because Meta should have known “parts most vulnerable to a theory of infringement.”). For these reasons, Plaintiff respectfully requests that this Court sustain Plaintiff’s objections and vacate Magistrate Judge Gilliland’s Report and Recommendation granting in part Defendants’ Motion to Strike Previously Undisclosed Theories of Stan McClellan Ph.D. Concerning Infringement of U.S. Patent 9,164,800.

Dated: February 10, 2023

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served or delivered electronically via email to all counsel of record, on this 10th day of February, 2023.

/s/ Jonathan K. Waldrop
Jonathan K. Waldrop